

M. Myška: Flat Fee Music

FLAT FEE MUSIC

by

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The rigid recording industry is falling apart trying to stop the “digital music (r)evolution” by any means possible. The music industry itself is flourishing. Music is being spread easily, at low cost, at no time within the globally networked community via the Internet. Unluckily for the passionate music lover, current business models and legal regulations are not following the state of affairs.

But the time has come to accept these simple facts. The main issue now should be setting up an adequate business and legal framework for these activities of music users and what’s most important – monetizing of them.

Flat fee music offers an alternative business model, which is reflecting the current reality. According to this concept, every registered user would have access to digital music for a small monthly flat fee – much like commonly known fees for internet access, TV or radio. Royalties should be then divided according to the actual use of copyrighted works.

The main aim of the paper is to introduce the basic foundations of this visionary concept of music distribution. Furthermore, its consequences, specifically a possible development towards an alternative compensation scheme and corresponding change in licensing policies, should be discussed.

KEYWORDS

Flat fee music, digital dilemma, digital music licensing, IP rights

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THE DIGITAL DILEMMA [1]

Intellectual property rights are indisputably at the core of debates concerning cyberspace. *Advances in technology have produced radical shifts in the ability to reproduce, distribute, control, and publish information* and thus enabled a plethora of ways how to handle copyrighted works. The opportunity to spread the work in minimum time over a global territory without loss of quality has significantly challenged the traditional notion of copyright, that is *the exclusive right to copy as the first and perhaps most basic right of a copyright holder*.¹ In the world of communicated distribution and digitalization, any basic operation with copyrighted content or access to it, (i.e. immaterialized sum of zeros and ones) is a “copy” in the meaning of copyright.

This inner dichotomy between the basic right of copyright holder to control the use of content and the immanent feature of digitalized content described above is known as the digital dilemma - a case in point being the current situation in music recording industry.

Despite the 500 legitimate online music services in over 40 countries,² estimated ten million users still use peer-to-peer file-sharing networks at any one time. A UK survey³ conducted in July 2007 has shown that a full 91% of file-sharers claimed the availability of music for free as the main reason for their illegal behavior. Looking into the future, the same survey has shown that 59% of file-sharers will download more often or at least at the same rate in the upcoming 12 months. Knowing this, the recording industry representatives⁴ are still trying to sue⁵ either the file-sharing software itself out of existence or make the users stop using it.

¹ National Research Council, Committee on Intellectual Property Rights and the Emerging Information Infrastructure, 2000, *The Digital Dilemma: Intellectual Property in the Information Age*, http://www.nap.edu/html/digital_dilemma/exec_summ.html [Accessed 30 Dec 2007] National Academy Press, Washington, D.C.

² According to the Digital Music Report 2007, International Federation of the Phonographic Industry, 2007, Digital Music Report 2007, www.ifpi.org/content/section_resources/digital-music-report.html [Accessed 30 Dec 2007]

³ Entertainment Media Research, 2007, http://www.entertainmentmediaresearch.com/reports/EMR_Digital_Music_Survey2007.pdf [Accessed 30 Dec 2007]

⁴ Recording Industry Association of America, www.riaa.com and International Federation of Phonographic Industry, www.ifpi.org

⁵ The Anthology of the whole “Copyright wars” could be found under: <http://www.eff.org/issues/file-sharing>

Taking in account all the facts mentioned above, a significant change in the current system of digital music distribution and its licensing on a more general level needs to be done. Undoubtedly, finding an appropriate business model that would protect vested interests of all parties involved is the solution.

FLAT FEE MUSIC [2]

THE BASICS [2.1]

One of the genuinely discussed⁶ alternative business models and alternative compensating schemes represents the so called “Flat fee music” concept, whose basics were pertinently laid down by Jim Griffin: *“It’s all about a pool of money, and a fair way to divvy it up.”*⁷

Before we address and discuss the emerging problems of the questions how this pool of money should be created and divided, let us explain out of what primary thoughts this concept originated.

Painting with a broad brush, the digital revolution considerably changed the approach to music in general, both of the artist and the consumers.

Speaking about artist, the most important shift relates to the distribution/promotion chain. Compared to “offline” times, the intermediaries (i.e. record labels, record retailers) do not play the crucial role today. Instead, a broad range of online applications in the promotional area is on hand, including plain homepages, blogs, podcasts, YouTube and also social networking services (e.g. MySpace, Facebook). The scope of distribution possibilities has grown notably, including, but not limited to legitimate online music services like Snocap, iTunes, MySpace, Rhapsody and others.

From the consumer point of view music could be found on demand almost everywhere on the Internet, demonstrative examples include: p2p, customizable internet radios, YouTube⁸, Google video, last.fm and many others. Furthermore, the possibilities of sharing music with friends expan-

⁶ The best known are the following scholars and thinkers: Harvard University Professor Terry Fisher; Media Futurist Gerd Leonhard, who calls his version of flat fee music “Music like Water”; Jim Griffin and Shuman Ghosemajumder presenting it as “The Open Music Model”

⁷ Griffin, J., *Jim Griffin on the Future of Music*, <http://grip.law.harvard.edu/articles/03/11/28/095219.shtml> [Accessed 30 Dec 2007]

⁸ Inclusive the „quasi-video sharing” on YouTube – in this case a “short clip” consisting of high-quality mp3 with merely simple static background is uploaded.

ded dramatically: Bluetooth; USB sticks, external hard disks, CD and DVD swapping, sharing music via all forms of instant messaging (i.e. Skype, ICQ etc.).

Moreover, the technological development is running headlong into a perfect, omnipresent, cheap and volume-unlimited wireless internet connection. In these circumstances, downloading will become redundant since the content will be available online 24/7. The sharers will not share the files as such but merely links to the location of the files. Also, the above mentioned world of unlimited abundance, ubiquity of music on demand turns the classic “pay first – then hear” way of exploring music upside down.

Nowadays, the key is not the content itself, but being found in the flood of content. To articulate it very simply - what matters is attention, followed by building a community of loyal fans and consequently obtaining indirect benefit in related markets, which means especially sales of merchandise, concert tickets and other related “non-music” services.

Considering all this, we may claim that the rights-holders effectively lost control over their protected in an unprecedented way. Doubts over the importance of selling “pieces of music” stood at the beginning of the flat fee music: firstly, if the problem of solving the digital dilemma lies in the dichotomy copy/access, why not just stop caring about controlling the copies sold and sell the access? Secondly, if the users opt for p2p because it’s free, why not provide the users with something that at least “feels like free”? The flat fee music concept is based exactly on fulfilling these two basic needs of users and simultaneously compensating the rights-holders fairly and effectively.

CREATING THE “POOL OF MONEY” [2.1]

First thing to do in the flat fee music system is to raise up the money. Instead of “pay-as-you-go” or “pay-by-the-piece” pricing models as we know today, a relatively small monthly (say \$5) payment should be imposed on every active registered user in the system. In exchange the customers would gain the freedom to share and use the music any way they want to. According to EFF there are roughly 60 million file-sharing Americans in total. Multiplied by \$5 a month we get a solid \$300 000 000 for the American artists and other right-holders to divide a month. Moreover, Internet service pro-

viders could bundle the fee in the price for their services, or p2p file-sharing software vendors could include the fee into a subscription model for their software.

DIVIDING THE “POOL OF MONEY” [2.2]

The royalties should be then divided according to the actual use based on a pro rata share. To figure out the factual share, every use of digital music files should be monitored, but rather with the help of non-invasive, non-protecting simple use-tracking watermarking or fingerprinting mechanism.⁹ Another option would be to involve volunteers in electronic inquiries on what is being shared.¹⁰

VOLUNTARY COLLECTIVE LICENSING [2.3]

Of course, such radical change must be accompanied with an evolutionary development in understanding of licensing of copyrighted material – preferably moving from “single-permission-to-use” to a lesser-control kind of licenses.

After evaluating the possible alternatives, the scientific community, headed by the Electronic Frontier Foundation, has picked the voluntary collective licensing model as an optimal one for the purpose of flat fee music concept.

Under this licensing regime, the recording industry should form a collecting society,¹¹ which will consequently offer a catalogue of “feels-like-free” music to its users, as well as the needed legal certainty. The collected sum of money shall be divided among the rights-holders based on the principles described above.

The utmost advantage of this licensing model is clearly visible – the more users participate, the more powerful the system is and the more money goes to the right-holders.

⁹ For example: Melody Guard: <http://www.melodyguard.com/> ; Services of the Registered commons initiative: <http://www.registeredcommons.com/>

¹⁰ This scheme is quite commonly used in television advertisement.

¹¹ Yet another open question is, whether this assignment could be carried out by the contemporary Collective management societies.

EMERGING PROBLEMS [3]

The flat fee music model may seem like a panacea to the digital music business. However, some points of this whole idea are quite controversial and need to be discussed closer. Professor Fisher puts it very clearly: “[The problem] is the practicability of the idea - can you really design a system that reliably estimates the ways music works are consumed, without compromising privacy or succumbing to widespread fraud.”¹²

As mentioned above, the most obvious catch is to preserve the privacy of the user. The risk of monitoring the users’ activities misusing the database of users “listening habits” seems omnipresent. Crucial aim should be to *strike the right balance between preserving privacy and accurately estimating popularity*.

Next, if the royalties’ distribution should be based on the actual usage – the fundamental question remains: what exactly is this “use of copyrighted work”, which should be actually taken into account when calculating the shares? Is it downloading of a song, playing the song, burning it on CD/DVD or synchronizing it with a portable media player? Subsequently, if downloading is counted as a basis for dividing the royalties then creating an automated “download-bot” should not pose an obstacle for a skilled programmer.¹³

Also, the question remains, whether all of the “Majors”¹⁴ will be willing to share their music catalogues under such conditions. In this case, government could be involved in order to enact a compulsory license as an ultima ratio.

Finally, we would like to draw attention of the reader to Andrew Dubber’s blog entry,¹⁵ where she can find very extensive critic of the whole flat fee music conception.

Despite these problems, there is a lot of money in play in this specific subject matter of digital music. And when there is money to be made, there

¹² Orlowski, A., Fisher, T., 2004, Digital music: flat fee futures, The Register http://www.theregister.co.uk/2004/12/28/fisher_promises_to_keep/ [Accessed 30 Dec 2007]

¹³ This being only the simplest exemplary method of „circumventing“ of the system.

¹⁴ The major recording companies:, Warner Music Group, EMI, Sony BMG, and Universal Music Group

¹⁵ Dubber, A. 2007, ‘Music like water revisited’ *New Music Strategies*, <http://newmusicstrategies.com/2007/10/26/music-like-water-revisited/> [Accessed 15 Dec 2007].

is also a playing field for the creative incentive of entrepreneurs and the will of policy makers to tackle these issues.

CONCLUSION [4]

Due to the intertwining relationship between business, economy and law, cyberspace related issues tend to be very complex,¹⁶ with a conspicuously high risk of stifling the technical development by legal “overregulation”. The problematic of digital music distribution is no exemption to this statement. To quote John Kennedy, IFPI CEO, “*we are still in a period of innovation and experimentation.*”¹⁷

After discussing the merits and demerits of the flat fee music system, we can conclude that the flat fee music alternative licensing and compensating scheme may be, provided that its essential drawbacks are going to be solved, one of the viable options for the age of digital music distribution.

¹⁶ On complexity and law see more in: Polčák, R. 2007, 'The Law and The complexity', Masaryk University Journal of Law and Technology, vol. 1, no. 1, pp. 1-8

¹⁷ IFPI, Digital Music Report 2007, www.ifpi.org/content/section_resources/digital-music-report.html [Accessed 30 Dec 2007]

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